

Honorable Judge Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANDREW HILLSTRAND, et al.,

Plaintiffs,

v.

CATCH PLANET, L.L.C., et al.,

Defendants

Case No. C12-1565RSL

**REPLY TO PLAINTIFFS’
RESPONSE TO DEFENDANTS’
MOTION FOR JUDGMENT ON
THE PLEADINGS**

**NOTE OF MOTION CALENDAR
April 5, 2013**

I. BACKGROUND

In their motion under Federal Rule of Civil Procedure 12(c) for Judgment on the Pleadings, Defendants, Travis Arket and Catch Planet, L.L.C. (“Catch Planet”) moved to dismiss all of Plaintiffs’ claims under Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted and have requested their attorney’s fees under CR 11. Plaintiffs’ filed their Response on March 29, 2013.

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II. ARGUMENT

A. Defendants Have Stated the Proper Legal Standard

Plaintiffs concede that when a Rule 12(c) motion is used as Defendants have done, to raise a defense of failure to state a claim, a motion for judgment on the pleadings faces the same test as a motion to dismiss under Rule 12(b)(6). Therefore, Defendants' Motion is properly before the Court in accordance with *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988).

Contrary to Plaintiffs' argument that Defendants require Plaintiffs to plead with particularity, Defendants argue that Plaintiffs have stated conclusory allegations in the form of threadbare recitals of the elements in each of their causes of action. Plaintiffs' pleading as discussed in Defendants' Motion and herein, is insufficient to survive a motion to dismiss for failure to state a claim. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *McGlinchy*, 845 F.2d at 810.

B. Plaintiffs Fail To Allege Any Facts That Impose Personal Liability On Travis Arket.

Contrary to Plaintiff's argument, Plaintiffs' allegations in paragraphs 45 and 46 of their complaint do not allege any facts that could impose personal liability on Travis Arket. Paragraph 45 states the "Plaintiffs discovered the domain name www.catchplanet.com ("Infringing Domain") offering goods identical to those offered by the Plaintiff, Andrew Hillstrand under the mark Bad Boys of the Bearing Sea." Paragraph 46 states "An investigation as to the owner of the Infringing Domain revealed that it was registered through GoDaddy.com and the Registrant was Defendant Travis Arket." Just because Travis Arket registered www.catchplanet.com, does not show that he owns the domain. Limited Liability Companies naturally operate through their

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members, and as the sole member of Catch Planet, LLC, Travis Arket is not personally liable solely by reason of being a member of the limited liability company. RCW 25.15.125(1); *Chadwick Farms Owners Ass'n v. FHC LLC*, 166 Wash.2d 178, 200 (2009). Therefore, contrary to Plaintiffs' argument that piercing the corporate veil theory is irrelevant in this matter, Plaintiffs must allege facts that show that Catch Planet, LLC was used to violate or evade a duty and that Catch Planet, LLC must be disregarded to prevent loss to an innocent party. *Chadwick Farms*, 166 Wash.2d at 200. Plaintiffs have not alleged any facts that Travis Arket formed Catch Planet, LLC ("Catch Planet") so that he could evade personal liability for the actions conducted by Catch Planet, LLC and therefore, this court must dismiss Mr. Arket from Plaintiffs' lawsuit with prejudice and not permit Plaintiffs leave to amend their complaint.

C. Plaintiff Andrew Hillstrand Fails To Allege Any Facts To Support's His Claims for Trademark Counterfeiting and Infringement Under Section 32(1)(a) and 34(d) of the Lanham Act, 15 U.S.C. Sections 1114(1)(a) and 1116(d).

Contrary to Plaintiff's argument that he has properly alleged facts to support these causes of actions, Defendants argue that he merely recites language in the statutes comprising his causes of action for counterfeiting and infringement in Counts I and II, but fails to provide any factual allegations how and when defendants infringed upon and counterfeited his mark. Mr. Hillstrand's threadbare recitals of the elements of this cause of action, supported by mere conclusory statements, do not suffice. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Plaintiff fails to describe any of the goods offered by Catch Planet or that Plaintiff offers that are identical; when he became aware of said Infringing Domain; when Plaintiff began offering said goods; and what channels he and Catch Planet use to market the goods; how the goods are marketed and labeled; and how said use by Catch Planet is likely to cause confusion,

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1 mistake or deception of the public as to the source, sponsorship, or approval of his services in
 2 connection with a particular sale; and he fails to identify any sale made by Catch Planet that
 3 infringed or counterfeited his mark. As the Court held in *Twombly*, 550 U.S. at 557, as in the case
 4 at bar, where a complaint pleads facts that are “merely consistent with” a defendant's liability, it
 5 “stops short of the line between possibility and plausibility of ‘entitlement to relief.’”

6 Plaintiff also does not have standing to bring this cause of action because Catch Planet had
 7 a right to use the subject mark prior to Andrew Hillstrand’s identical registered mark on January
 8 31, 2012, and Catch Planet has not used the mark on or after this date and there are no facts
 9 alleged to the contrary. See Defendants’ Exhibit A and Plaintiffs’ Exhibit H. Because there are
 10 no possible amendments to his Complaint that can cure the defects in his pleading, these causes of
 11 action must be dismissed with prejudice and without leave to amend them.

12 **D. Plaintiff Andrew Hillstrand Fails To Allege Any Facts To Support His For**
 13 **False Designation Of Origin Under Section 43(a)(1)(A) of the Lanham Act, 15**
 14 **U.S.C. Section 1125(a)(1)(A).**

15 Contrary to Plaintiff’s argument that he has properly alleged facts to support this cause of
 16 action, Plaintiff again alleges in Count III, the same threadbare recital of the elements of this cause
 17 of action, supported by mere conclusory statements. Plaintiff’s pleading in such a manner is
 18 insufficient to entitle him to relief.

19 Plaintiff merely alleges that Defendants have offered the identical goods marketed
 20 through the same channels as Plaintiff, bearing the infringing mark “Bad Boys of the Bearing Sea”
 21 and that defendants caused advertising to be placed in interstate commerce offering goods bearing
 22 the mark “Bad Boys of the Bearing Sea.”

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Plaintiff fails to allege how, when and what goods or sales he offers and what goods and sales Catch Planet offered or sold in commerce. Plaintiff fails to allege what, how, and when said goods were marketed by Catch Planet on or after January 31, 2012, with the infringing mark to the public in commerce; and how said goods could confuse, cause mistake, or deceive the purchasers with plaintiff's goods; or how and when Catch Planet used the mark in specific advertising or promotional materials. Plaintiff also fails to allege the essential element how said false designation of origin has injured or will likely injure or damage him. Plaintiff also does not have standing to bring this cause of action because Catch Planet had a right to use the subject mark prior to Andrew Hillstrand's identical registered mark on January 31, 2012, and Catch Planet has not used the mark on or after this date and there are no facts alleged to the contrary. See Defendants' Exhibit A and Plaintiffs' Exhibit H.

Based on the foregoing, Andrew Hillstrand has failed to allege any facts, other than baseless conclusions, to support his cause of action against Catch Planet for a claim of False Designation of Origin. Because there is no possible amendments to his Complaint that can cure the defects in his pleading, this cause of action must be dismissed with prejudice and without leave to amend.

E. Plaintiff Andrew Hillstrand Fails To Allege Any Facts That Support His Claim for Common Law Unfair Competition

Contrary to Plaintiff's argument, Plaintiff fails to allege in Count IV, any elements of a cause of action for Common Law Unfair Competition.

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1 Plaintiff merely alleges without any facts that Catch Planet is liable for unfair competition
 2 because the ordinary consumer (without specifying what services offered by the plaintiff, or the
 3 defendant that the consumer would be confused about) is likely to be deceived and or confused as
 4 to the sources of the defendant's services. Plaintiff fails to allege how the confusion interferes
 5 with his business or unfairly competes with his business. Plaintiff doesn't even describe what
 6 business Catch Planet would be competing with. Plaintiff also does not allege any specific harm,
 7 injury or damages he has suffered or would suffer. Plaintiff also does not allege how Catch
 8 Planet's unfair competition is or would be the proximate cause of his harm, injuries, damages.

9 Clearly, Plaintiff has failed to state a claim upon which relief can be granted for unfair
 10 competition. These conclusory allegations without more are insufficient to defeat a motion to
 11 dismiss for failure to state a claim. *McGlinchy*, 845 F.2d at 810. Moreover, without more than
 12 this, the Court cannot possibly draw any reasonable inference that Catch Planet is liable for the
 13 misconduct alleged. *Twombly*, 550 U.S at 556. Because there is no possible amendments to his
 14 Complaint that can cure the defects in his pleading, this cause of action must be dismissed with
 15 prejudice and without leave to amend.

16 **F. Plaintiffs' Fail To Allege Any Facts That Support State Law Claims For**
 17 **Misappropriation of Their Names and Likeness Under RCW 63.60.050,**
 18 **Counts V-IX.**

19 Contrary to Plaintiffs' arguments that they have alleged facts to support these claims,
 20 Plaintiffs merely allege identical conclusions in Counts V-IX that Catch Planet used their names
 21 and likeness on marketing and promotional materials for Defendants' infringing goods, including
 22 clothing, mugs photographs, etc. without their consent for purposes of Defendants' financial

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1 advantage. Plaintiffs' threadbare recitals of the elements of this cause of action for
 2 misappropriation supported by mere conclusory statements, does not suffice. *Bell Atlantic Corp.*
 3 *v. Twombly*, 550 U.S. 544, 555 (2007). Plaintiffs fail to allege a specific date that Catch Planet
 4 used or sold any of their names or property and how it gained a financial advantage in said use or
 5 sale of said misappropriated name or likeness. Again, the only facts alleged of such conduct is a
 6 reference to Catch Planet's website on an unspecified date that Plaintiffs became aware that Catch
 7 Planet was displaying their name or likeness on its website. Other than Plaintiffs' bare
 8 conclusions, there are no facts alleged in the Complaint of said use or sale or distribution by Catch
 9 Planet of their names or likeness.

10 These conclusory allegations without more are insufficient to defeat a motion to dismiss
 11 for failure to state a claim. *McGlinchy*, 845 F.2d at 810. Moreover, without more than this, the
 12 Court cannot possibly draw any reasonable inference that Catch Planet is liable for the misconduct
 13 alleged. *Twombly*, 550 U.S. at 556. Because there is no possible amendments to their Complaint
 14 that can cure the defects in their pleading, these causes of action must be dismissed with prejudice
 15 and without leave to amend.

16 **G. Plaintiffs Fail to Allege Any Facts Showing Irreparable Injury For Injunctive**
 17 **Relief.**

18 Plaintiffs seek an injunction to prevent Catch Planet from further use of its
 19 trademark and from using their name or likeness. When seeking an injunction, the plaintiffs
 20 must show there is a cognizable wrong to correct. *Hollis v. Garwall, Inc.*, 88 Wn.App 10, 16
 21 (Wash. Ct. App. Div. 1 1997). The essential elements of the right to an injunction are necessity

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1 and irreparable injury. See also 15 U.S.C. Section 1116 et seq. and RCW 7.40.020. As indicated
 2 throughout Defendants' Motion and this Reply, Plaintiffs have failed to allege other than in
 3 conclusory form, any irreparable injury they may suffer if an injunction is not granted.

4 Based on the foregoing, Plaintiffs are not entitled to injunctive relief in this matter.

5 **H. Plaintiffs' Attorneys Should Be Sanctioned Under CR 11 For Filing These**
 6 **Causes Of Action Against Travis Arket and Catch Planet Knowing That**
 7 **Said Actions Lacked Any Basis in Fact and Were Unwarranted by**
 8 **Existing Law.**

9 Contrary to Plaintiffs' argument, CR 11 sanctions should be imposed against their attorneys
 10 for naming Defendants in this lawsuit without any basis in fact or in law and due to the fact that
 11 they failed to conduct a reasonable inquiry into the factual and legal basis of the claims alleged
 12 against Mr. Arket and Catch Planet. Defendants request that they be awarded their attorney's fees
 13 incurred by them in this matter as said sanctions.

14 **III. CONCLUSION**

15 Plaintiffs have failed to allege any facts that impose personal liability on Travis Arket and
 16 therefore, he should be dismissed with prejudice from this lawsuit. Plaintiffs' conclusory
 17 allegations with regard to their claims against Catch Planet are insufficient to defeat a motion to
 18 dismiss for failure to state a claim. *McGlinchy*, 845 F.2d at 810. Moreover, without more than
 19 what they have alleged in their Complaint, this Court cannot possibly draw any reasonable
 20 inference that Catch Planet is liable for the misconduct alleged. *Twombly*, 550 U.S. at 556.
 21 Because there are no possible amendments to the Complaint that can cure the defects in Plaintiffs'
 22 pleadings, all of the claims asserted against Travis Arket and Catch Planet must be dismissed with

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1 prejudice and without leave to amend. Defendants respectfully request that they be awarded their
2 attorney's fees in defending this matter in accordance with Their Motion and this Reply.

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4 Respectfully submitted this 1st day of April, 2013.

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6 SMITH LAW PARTNERSHIP, LLP

7 /s/ Mark E. Smith

8 Mark E. Smith, WSBA #30924
9 Attorneys for Defendants
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